80-324

No. _____

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1980

BENNY CONIGLIO,

Petitioner,

-v.-

THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

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Of Counsel

August 20, 1980

Questions Presented

Whether the defendant was subjected to an unfair trial on a charge of murder in violation of the due process clause of the Fourteenth Amendment to the United States Constitution when the court limited his confrontation of the only two significant prosecution witnesses by restricting his cross-examination of one witness and denying the defendant's offer of proof to show that the other witness was biased?

List of Parties

Apart from the parties named in the caption to this Petition the only other party involved in the case was the co-defendant George Clementi who was also convicted.

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BENNY CONIGLIO,

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THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

The petitioner Benny Coniglio respectfully prays that a writ of certiorari issue to review the judgment of the Appellate Division, First Department of the Supreme Court of the State of New York affirming the judgment of conviction entered against the petitioner by the New York Supreme Court, Bronx County.

Opinions Below

The Appellate Division, First Department, of the New York Supreme Court did not render an opinion. Neither did the New York Supreme Court (Eggert, J.) render an opinion.

Jurisdiction

The date of the judgment of the Appellate Division, First Department, of the New York Supreme Court was March 25, 1980, which was also the date of entry. A timely petition for leave to appeal to the New York Court of Appeals was denied on June 25, 1980. A copy of the order of the New York Court of Appeals denying leave to appeal appears in the Appendix hereto at p. 3a. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1257(3).

Constitutional Provisions Involved in the Case

1. United States Constitution, Amendment VI (in pertinent part): In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . . .

2. United States Constitution, Amendment XIV (in pertinent part): . . . nor shall any State deprive any person of life, liberty or property without due process of law.

Statement of the Case

Coniglio was convicted, together with a co-defendant George Clementi, of one count of murder in the second degree in violation of § 125.25(1) of the New York Penal Law. He was sentenced to a minimum term of imprisonment of 25 years with a maximum term of life imprisonment.

The victim, Tommy Genco, who worked as a doorman at the Cabaret Lounge disco-bar in the Bronx in New York City, was shot in the head and killed outside the bar on the night of May 27-28, 1973. A witness saw Genco "leaning in a car" that was dark blue or green, heard a shot and saw Genco fall back. After the shot was fired the car drove off at high speed.

The evidence against Coniglio and Clementi was meager and the argument that the evidence was insufficient in law was a major ground of appeal. It was uncontested that Coniglio was in the bar on the evening of the shooting and there was some evidence (though not overwhelmingly clear) that Clementi was with him. A barman, Jack Skulsky, testified that he had seen Coniglio and a companion arguing with the victim and that the companion had slapped Genco in the face. Skulsky also said that he believed Coniglio and his companion were "packing" (carrying guns) since he observed a bulge in their waistbands. He testified that Coniglio indicated to him on leaving the bar that the fight was not over.

But several other witnesses at the bar who had observed Coniglio and his companion with Genco testified that they had seen no face slapping and heard no quarrel. No one could identify the murder car or had noted its license plate. It was variously described as black or dark blue or green, and the victim's brother said it had a wheel mounted on the back. There was evidence that the co-defendant Clementi owned a black Buick but not that it had a wheel on the back. One witness said that there were two men in the murder car but nobody could identify either of them.

Thus the direct evidence taken from the witnesses present at the scene of the murder (seven altogether) amounted, with the exception of Skulsky's testimony, to nothing more than placing Coniglio in the bar that evening and observing him in conversation with

the victim. The murder weapon was never found but the bar owner, Santoro, who had quarreled with the victim, owned a .38 revolver which was the caliber gun with which Genco was shot. Yet the police in their investigation of the killing never conducted a ballistics test on Santoro's gun.

There were two further items of evidence against Coniglio. The prosecution presented what they claimed amounted to evidence of flight, though this only established that one week after the killing Coniglio was no longer living in New York City at the home of his parents where he had resided earlier. In fact at the time he was living under his own name in Florida so that it is not apparent how this evidence indicates flight in any significant sense. Finally, the prosecution offered the testimony of a woman, Nanette Sanzo, with whom Coniglio had lived in Florida after the killing had taken place in New York. Sanzo testified that at some date in 1973 Coniglio made a statement to her:

> He told me that he had shot someone in the head in the front of a bar in New York over ten thousand dollars and he was sitting in a car when it happened.

Skulsky and Sanzo were virtually the only two witnesses against Coniglio. Without their testimony there was no case at all. Yet their evidence was inherently suspect and the defense was prevented by erroneous and unconstitutional rulings from confronting them adequately.

Skulsky's testimony was inconsistent with that of all other witnesses as to the time of the shooting, as to the crowded state of the bar, as to when Genco left the bar, as to whom he was with when he left the bar, as to who was working at the bar that night and as to when he first met Coniglio. On all these points Skulsky either was contradicted by all other witnesses or retracted and changed his own story.

Notably nobody saw Coniglio quarrel with the victim except for Skulsky.

Skulsky had never told his story to the authorities until one week before the trial which was almost six years after the killing. At that time he had excellent reasons for his sudden rush of recollection. Skulsky was a "rogue cop" who had resigned years before from the New York City Police Department because he was faced with departmental charges for the use of marijuana. At the time of the trial he had felony charges pending against him in another state where he then lived for possession of three quarters of a pound of marijuana, and the New York prosecutor in the Coniglio trial had promised to tell the authorities in the other State of Skulsky's cooperation.

All this was brought out by the prosecution or the defense on cross-examination. But before that cross-examination could begin, the prosecutor asked the court to order defense counsel not to inquire into the residence of Skulsky or the jurisdiction where the marijuana prosecution was pending. The basis of the request was that Skulsky was afraid that his life was in danger because another witness, Nanette Sanzo, had allegedly received a "strange phone call" asking "unusual" questions. On the strength of these vague assertions by the prosecutor on which no hearing was held and which related not to Skulsky but to another witness, the court ruled, over objection by the defense, that cross-examination would be limited to the "region" (as opposed to the State) in which Skulsky lived and that, while inquiry could be made as to the circumstances surrounding the marijuana charge, this could not include identifying the jurisdiction in which it was pending.

When Coniglio's counsel cross-examined Skulsky he extracted the information that the "possession of marijuana" charge, as it had been so blandly characterized on direct examination, was in fact a felony charge of possession of three quarters of a pound.

Skulsky was then asked whether that was not a serious charge, to which he replied, "No, sir." At this point the cross-examination abandoned this line of questioning, presumably because of the roadblock thrown in its way by the court's ruling. (See Appendix pp. 4a-8a.)

This brusque curtailment of the cross-examination of Skulsky was followed by a similarly unjustifiable sheltering of the other vital prosecution witness, Nanette Sanzo, with her story of the admission made by Coniglio. Sanzo had first told the police of Coniglio's statement to her four years after he allegedly made it. While her recollection of his remarks was so detailed and perfect her recollection in other areas was very defective. She could not remember the month in which the statement was made nor why he had said such a thing to her. She could not even remember the year in which she met Coniglio. At the trial she testified this was in 1973 but a police officer stated at a pretrial hearing that she had said she met Coniglio in 1974 or 1975, while another officer had testified that she placed the time as a "couple of years ago" in an interview conducted in 1978. When the New York police first went to Florida to interview Sanzo the Florida detectives would not disclose her name because she was an "informer."

In order to discredit Sanzo and point to a possible motive for her to testify falsely against Coniglio the defense sought to show that she had known Coniglio in 1971, two years before the killing. Such a showing would have flatly contradicted her direct testimony to the effect that she had not met him until after the killing. Such proof would not only have exposed a lie on her part but would also have afforded the defense a field of opportunity to develop motives arising out of Sanzo's past association with Coniglio that might have led her to hold a grudge or harbor hostility.

After Sanzo had said that she first met Coniglio in 1973, counsel for Coniglio, during cross-examination,

showed her a photograph of herself in the company of Coniglio, and asked her whether writing and a date on the back of the picture refreshed her recollection as to when she had first met Coniglio. She said that it did not and denied that she had met Coniglio in 1971, two years before the killing. At this point counsel for Coniglio moved that the photograph be admitted into evidence. The prosecution objected as to the writing on the back and the court agreed, ruling correctly that this was inadmissible as constituting hearsay.

Counsel for Coniglio responded that he would call the person who took the photograph and offer testimony as to the date it was taken. The prosecutor objected that this would be "immaterial because it was collateral," because it would amount to the introduction of independent evidence to impeach the witness. After the briefest colloquy the trial court denied the admission of the photograph and implicitly denied the opportunity to call the photographer. The pertinent passage from the trial minutes is reproduced in the Appendix at pp. 9a-14a.

Reasons for Granting the Writ

In a murder trial where the defendant was in the outcome sentenced to life imprisonment the trial court sharply curtailed the opportunity of the defense to challenge the testimony of the only two significant witnesses for the prosecution. This was done in plain breach of the constitutional interpretations embodied in decisions of this Court expounding the right of a defendant to confront the witnesses against him guaranteed by the Sixth Amendment to the Constitution of the United States as applied to the States by the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400 (1965). In the case of the witness Sanzo the action of the trial court also breached the right of the defendant

to compulsory process guaranteed by the Sixth Amendment and applicable to the States through the Fourteenth Amendment. *Washington v. Texas*, 388 U.S. 14 (1967).

The Restriction on Cross-Examination

In *Alford v. United States*, 282 U.S. 687 (1930) this Court held that the ruling of the trial court disallowing on cross-examination questions seeking to elicit a witness's place of residence was an abuse of discretion and constituted reversible error. For the application of this principle to the States see *Smith v. Illinois*, 390 U.S. 129 (1968). In *Alford* this Court stated, at 692-93:

> Cross-examination of a witness is a matter of right. Its permissible purposes, among others, are that the witness may be identified with his community so that . . . the jury may interpret his testimony in the light reflected on it by knowledge of his environment and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased. Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not in general apply. It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test without which the jury cannot fairly appraise them. (Citations omitted).

It may be true that failure to reveal a home address is not always ground for reversal and that the curtailment must be significant in the circumstances of the case. *United States v. Marti*, 421 F.2d 1263 (2nd Cir. 1970); *United States v. Teller*, 412 F.2d 374 (7th Cir. 1969). But in the present case there was ample indication that Skulsky was a dubious character, already dismissed from the New York City Police and under indictment for a narcotics felony in a nameless State. The circumstances of his giving information to the prosecutor that was damaging to Coniglio were tinged with doubt. Having known of Skulsky for years the authorities only obtained the information a week before the trial when Skulsky badly needed their help. This is just the kind of witness whose credibility could have been demolished by one further blow and the destruction of his credibility would likely have meant acquittal for Coniglio. But the chance to strike that blow was improperly denied.

If the State and residence of Skulsky had been revealed several consequences would have followed. First, the full implication of his indictment in that State could have been pursued. As it was, the prosecutor presumed to tell the jury in his summation that Skulsky's offense was not all that serious since he could only get six months imprisonment for it. Yet the defense was not permitted to ask any questions as to the penalty that would have elicited from the witness the name of the State in which he lived. This being so, it is hard to see how the defense could have inquired fully as to the possible consequences of the crime without having to take any answer the witness chose to give. Second, once Skulsky knew that he was protected by the court from having to disclose even the State of his residence he could reply in an inconclusive or evasive or even perjurious fashion to defense questions about his mode of life, his other criminal activities, his associations and behavior without real fear of

refutation as to any significant misstatements. In this way the cross-examination was effectively stopped just when it approached the point where the *coup de grace* might have been administered.

The constitutional error is compounded by the slender reasons the court had for such a ruling. Perhaps there may be circumstances where the witness is in such clear and present danger that it would be proper to conceal his residence. But in the present case not only his particular residence but even the State was concealed merely because of a prosecutorial allegation that *another* witness had received an unusual telephone call. Even if substantiated by a hearing this would have been inadequate but no hearing was held.

This Court has emphasized the central nature of the right to cross-examination in *Davis v. Alaska*, 415 U.S. 308, 315 (1973):

> Confrontation means more than being allowed to confront the witness physically. 'Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination.' [Citing and quoting *Douglas v. Alabama*, 380 U.S. 415, 418 (1975)].

If this right is to be restricted it can only be for the most overwhelming reasons. In *Davis v. Alaska, supra*, this Court found that the protection of the anonymity of a juvenile offender was not a sufficient interest and that restriction of cross-examination based on that reason was prejudicial error requiring the reversal of a state conviction. Yet in the present case there was not even the semblance of an inquiry by the court into whether there was any conceivable interest to be protected. On the prosecutor's self-serving say-so that another witness had received an unusual telephone call the court brusquely ruled that the cross-examination of Skulsky was to be severely curtailed.

This was an abuse of discretion that reaches the dimension of an unconstitutional ruling. *United States v. Fife*, 573 F.2d 369, 376 (6th Cir. 1976),

> The mere expression of apprehension by a witness who is reluctant to divulge his address is not sufficient justification for restricting cross-examination without further inquiry. An *in camera* hearing might be held to determine if there is a factual basis for such apprehension.

The error cannot be viewed as harmless where a murder conviction rests on no foundation of direct evidence. This point is not affected by the circumstance that at one point in a colloquy with the court defense counsel stated that he knew where Skulsky resided. The point at issue is not what personal information might be in the possession of defense counsel but rather what line of questioning he was permitted to develop in cross-examining the witness. If the issue were one of discovery then of course the fact that the defense possessed the information would be conclusive. But here the issue is not one of discovery but of confrontation. What the court forbade was the development of a line of questioning and that prohibition was not lifted by information that was otherwise in the possession of the defense.

The Denial of Confrontation as to Sanzo

The defense proffer of a photograph of Coniglio together with Sanzo with a date inscribed on the back previous to the date of the killing followed Sanzo's denial that she had known Coniglio before the killing of Genco. She was shown the photograph in order to refresh her recollection but persisted in her denial. The defense then sought to admit the photograph and the writing on the back into evidence and was initially met with the ruling that the writing was inadmissible hearsay. As far as it went this ruling was correct.

But at this point the defense inquired if it might call the photographer and the prosecutor objected that this would be "collateral." (See Appendix pp. 9a-14a.) The court's response was confusing for it appears to be directed to the photograph itself and not to the defense request for a ruling on the propriety of calling the *photographer*. The court inquired as to the probative value of the "photograph" and counsel for Coniglio replied,

> It has probative value insofar as I intend to offer the relationship with respect to the witness and this defendant prior to the date in question. (Appendix p. 13a).

Apparently quite unimpressed by this, the court immediately stated: "I sustain your [the prosecutor's] objection to the admission of the photograph." While this ruling was in terms of the photograph it followed on a discussion of the photographer and was apparently taken by the defense as foreclosing all pursuit of that subject area since no further attempt was made by the defense to open the matter. The basis for the court's ruling is not entirely clear but it appeared to rest on the arguments that the photograph and the writing on the back could not be put in evidence as hearsay and that the photographer could not be called by the defense since this would amount to introducing extrinsic evidence on a collateral matter as to which the witness's answer must be accepted.

The distinction traditionally made in the law of evidence is between collateral matter that has only a general tendency to attack the credibility of the witness and matter that has a particular tendency to show bias or partiality. As to the former the witness's answer on cross-examination "must be taken" and cannot be challenged by extrinsic evidence. But as to the latter it is well established that independent proof may be adduced to contradict the witness and to demonstrate a tendency to bias. *United States v.*

Hawley, 547 F.2d 720, 722 (2d Cir. 1976). No doubt this distinction is not of constitutional dimension in all its aspects and some latitude may be allowed in its development in different jurisdictions, but, when its application amounts to a substantial infringement on confrontation and the defendant's right to compulsory process, the state procedure must be condemned by a federal reviewing court.

It is true that in the present case the matter sought to be proved by extrinsic evidence, (the date on which the photograph of Sanzo and Coniglio was taken), was not in itself obviously indicative of hostility or bias on the part of the witness. But, just as clearly, it might have laid a foundation on which the defense by exploration could have built a host of possible motives for Sanzo to lie. The defense cannot be required to predict with particularity the value of a legitimate line of examination and proof. *A fortiori* it cannot on appeal indicate the specific goal of a path that was blocked. As one court has said:

> A defendant should be afforded the opportunity to present facts which, if believed, *could lead to the conclusion*, that a witness who has testified against him either favored the prosecution or was hostile to the defendant. (Emphasis added). *United States v. Haggett*, 438 F.2d 396, 399 (2d Cir. 1971).*

This is especially necessary when there is a possibility that the witness is a professional informant, *United States v. Alvarez-Lopez*, 559 F.2d 1155, 1160 (9th Cir. 1977), and it must be remembered that there was some evidence indicating that Sanzo was such an informant.

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*And see the language in *Alford v. United States*, 282 U.S. 687, 692-93 (1930), *supra* at p. 8.

The Sixth Amendment to the United States Constitution is again directly implicated here. In *Davis v. Alaska, supra*, this Court observed:

> The partiality of a witness is subject to exploration at trial and is 'always relevant as discrediting the witness and affecting the weight of his testimony'. 3A J. Wigmore, Evidence § 940, p. 775 (Chadbourn rev. 1970). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. 415 U.S. at 316-317.

And, in language exactly applicable to this case, this Court continued in *Davis*:

> While counsel was permitted to ask Green *whether* he was biased, counsel was unable to make a record from which to argue *why* Green might have been biased or otherwise lacked that degree of impartiality expected in a witness at trial. (Emphasis in original). *Id.* at 318.

The issue in *Davis* was restriction on cross-examination while the question here is the larger aspect of confrontation and the denial of compulsory process residing in not allowing the defense to prove the date of the relationship between Coniglio and Sanzo by calling further evidence as to the photograph. But as the court observed in *Moynahan v. Manson*, 419 F. Supp. 1139, 1143 (D.C. Conn. 1976),

> [W]hile the right to call additional witnesses was not at issue in *Davis*, it does fit into the phrase 'to expose to the jury those facts from which they . . . could appropriately draw inferences . . . ', and the denial of this right was likewise denial of the sixth amendment right of confrontation. *Johnson v. Brewer*, 521 F.2d 556 (8th Cir. 1975).

The restrictive attitude adopted by the trial court was particularly reprehensible in a case of such terrible

import as the present. The denial of the evidence relating to the photograph was exactly that kind of hypertechnical approach to the law of evidence which this Court has suggested may amount to a denial of due process. *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). There is no saying where evidence of a prior relationship between Coniglio and Sanzo might have led. Conceivably the evidence could have done the defendant more harm than good. But that should not matter. As one federal court pointed out on the facts of the case before it,

> The essential point is that the jury must be given an opportunity to assess . . . the incident in whatever manner it wishes. It may, indeed, hurt the defendant if the jury believes that the informant would be more rather than less careful and truthful after being compromised . . . But more importantly, *the truth shall never be known if one of the two knowledgeable parties . . . is immune from reasonable scrutiny of his possible relationship with the government.* (Emphasis added). *Johnson v. Brewer*, 521 F.2d 556, 563 (8th Cir. 1975).

Similarly, how could the truth ever be known in the present case when Sanzo was protected by the ruling of the trial judge from reasonable scrutiny of the duration of her relationship with Coniglio? The thin cobweb of the prosecution's case was shakily propped by the two pillars of Skulsky and Sanzo. The defendant was deprived of the chance to show that those pillars were themselves rotted and crumbling. With one push the defense might have brought the whole rickety structure tumbling down, but through erroneous rulings the trial court interposed itself as an insurmountable protective barrier. The inescapable question is posed in *Beaudine v. United States*, 368 F.2d 417, 424 (5th Cir. 1966):

> [A]s the key witness upon which the Government's whole case rested both legally and persuasively, Mulvey was not exposed to the truth-revealing pressures of the sort of cross-examination which is really the heart of our adversary system . . . [T]his having occurred, we have no way of ruling out the likely harmful consequences. On a matter so important as Mulvey's trustworthiness and credibility, if we are left in doubt we cannot allow the conviction to stand.

The issuance of the writ of certiorari by this Court is the only means of redressing the fundamentally unfair trial afforded the defendant that may have resulted in the murder conviction of an innocent man.

Raising the Federal Question

The federal question was raised in the New York courts by way of direct appeal. Petitioner's brief in the New York Appellate Division devoted twelve pages to the issue raised in this petition, relying on both the Constitution of the State of New York and the Sixth and Fourteenth Amendments to the United States Constitution. The Appellate Division denied the appeal without rendering any opinion. While it did not, therefore, rule expressly on the federal question, its denial of the appeal can only be understood as a rejection of the petitioner's argument on the federal constitutional issue.

Conclusion

FOR THESE REASONS A WRIT OF CERTIORARI SHOULD ISSUE TO REVIEW THE JUDGMENT OF THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE NEW YORK SUPREME COURT.

Respectfully submitted,

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APPENDIX

Appendix A
Judgment of Appellate Division, First Department, New York Supreme Court

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on March 25, 1980

Present—Hon. Joseph P. Sullivan, Justice Presiding
David Ross
Arthur Markewich
Samuel J. Silverman
Paul J. Yesawich, Jr. Justices

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

-against-

BENNY CONIGLIO,
Defendant-Appellant.

ORDER OF AFFIRMANCE ON APPEAL FROM JUDGMENT
7778

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, Bronx County (Eggert, J.), rendered on April 25, 1979, convicting defendant of murder in the second degree, and said appeal having been argued by Mr. Gerald L. Shargel of counsel for the appellant, and by Mr. Gary W. Sucoff of counsel for the respondent; and due deliberation having been had thereon,

Appendix A
Judgment of Appellate Division, First Department, New York Supreme Court

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

ENTER:

JOSEPH J. LUCCHI

Clerk

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Appendix B
Certificate Denying Leave to Appeal to the New York Court of Appeals

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. BERNARD S. MEYER,
Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

BENNY CONIGLIO,
Defendant-Appellant.

CERTIFICATE DENYING LEAVE

I, BERNARD S. MEYER, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York
June 27, 1980

BERNARD S. MEYER
Associate Judge

**Description of Order:* Order of the Appellate Division, First Department, entered March 25, 1980, affirming judgment of the Supreme Court, Bronx County, rendered April 25, 1979, convicting defendant of murder in the second degree.

Appendix C
Excerpts From Trial Transcript, New York Supreme Court, Bronx County, Pages 67-73

(67) which we are speaking. And, that admonition that instruction of course is for your instruction throughout the trial.

(Whereupon, all parties approach the side bar and the following transpired, outside the hearing of the jury.)

MR. TARTAGLIA: I respectfully request that no questions be asked by defense counsel as to the present residence of this particular witness.

THE COURT: You will have to make some sort of a showing for that request, please.

MR. TARTAGLIA: Basically it involves the fact that there is a fear on his part as to his life being endangered. This is based in part upon the fact that another witness, Nanette Sanzo, who comes from another jurisdiction also, received a strange phone call, I believe, February 5th or 6th, which was completely inexplicable, which was asking questions about her and things about her which were of an unusual nature to the degree that we have become alarmed.

THE COURT: Become what?

MR. TARTAGLIA: We have become alarmed and (68) we ask with regard to these particular witnesses who are in another jurisdiction, at this time, that no questions be asked as to their present whereabouts, their present residence or in Mr. Skulsky's case, the jurisdiction where the outstanding matter is now pending. I will disclose it on the record for appeal. I ask that it not be disclosed to defense counsel or defendant for reason of safety to the witnesses.

MR. WINOGRAD: I object to it and I am going into it and I know where he lives and I know what

Appendix C
Excerpts From Trial Transcript, New York Supreme Court, Bronx County, Pages 67-73

jurisdiction he comes from. I am going into it unless the Court directs me otherwise.

MR. EVSEROFF: Objection. There has been no showing by the District Attorney in his argument that there is a viable reason for curtailing examination with respect to the credibility of this proffered witness. I think it is interesting when Your Honor asked him for a showing with respect to this witness he immediately began to cite something with respect to some other witness, which is not germane to this issue here. He has proffered this witness and this witness, like any other witness on this case, is subject to (69) to attack with questions to the subject matter of his credibility. It has been solicited on direct, he has presently a narcotics case pending. I certainly say we have a right to inquire on cross examination with respect to this witness and all the aspects surrounding him with the view of impeaching his credibility.

MR. TARTAGLIA: I respectfully submit if all that is so it doesn't matter where he presently resides. As to his credibility, that won't affect anything.

MR. WINOGRAD: The case is pending in the same jurisdiction?

MR. TARTAGLIA: That's correct.

THE COURT: Anything further?

MR. WINOGRAD: He is supposed to turn over the Rosario material.

THE COURT: I am not talking about any other matters, on this point. That's been raised.

MR. WINOGRAD: No, nothing further.

THE COURT: In view of the possibility of security of this witness, the Court will request that there be

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no questions asked of this defendant, where he resides or in what jurisdiction (70) this other matter is. However, counsel may inquire in cross examination of the general area where the defendant may be.

MR. TARTAGLIA: The general area?

THE COURT: Correction. Where the witness, which part of the country the witness is, but you may not ask specifically where the witness resides.

MR. TARTAGLIA: You are saying then, Judge, he must divulge the state?

THE COURT: No.

MR. TARTAGLIA: The region of the country?

THE COURT: Region is sufficient.

MR. EVSEROFF: I respectfully accept to Your Honor's curtailing the defendant's right of cross examination with respect to the material aspect of the testimony of this witness, particularly with respect to that which was elicited on direct examination.

MR. WINOGRAD: I join in that application.

THE COURT: I am not curtailing you on any cross examination of anything that was elicited but my recollection, on direct examination, this witness did not state he resided in a specific (71) area, nor did he make any reference to any jurisdiction that this other matter is pending on.

MR. EVSEROFF: I respectfully submit since it has been elicited on direct examination through the questions of the District Attorney that this defendant has been arrested with respect to a drug charge in another jurisdiction, I respectfully submit at the very least we would be entitled to inquire what the nature

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of the charge was, what the perspective -- what the penalties called for in that jurisdiction states, with respect to this, what his understanding is with respect to what the District Attorney, who the District Attorney has spoken to.

THE COURT: You certainly may, I am not foreclosing you.

MR. EVSEROFF: This, per se necessitates an inquiry with respect to what state this is in because the laws which -- Your Honor, would you instruct Mr. Tartaglia to have the decency to keep quiet when an application is being made. This, per se, presupposes an inquiry with respect to the jurisdiction that the case is pending. (72) I respectfully submit the penalties, vis-a-vis drug cases, vary from state to state. Your Honor, if they are state charges --

MR. WINOGRAD: Very frankly, up to this point, the District Attorney has given us nothing with respect to the credibility of this individual as he is supposed to do with respect to Rosario material up to this point we have received nothing. Prior criminal background, where they are pending, anything like that, to properly cross examine this particular witness with respect to his credibility and background. We need these materials. If we can't inquire, there is no use in cross examining him.

MR. TARTAGLIA: I disclosed on the record that he is a police officer that had to resign --

MR. WINOGRAD: Who are you to decide what you should disclose?

THE COURT: This Court is not placing any limitations whatever upon the cross examination of this

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witness except as indicated as to the actual residence at this point.

(73) MR. WINOGRAD: I am not interested in his --

THE COURT: I indicated you may inquire about the region where he lives, however, you may not inquire as to the actual jurisdiction of the Court in which this marijuana is pending, charges pending, but you may go into all of these facts and circumstances surrouding that arrest and any promises, agreement or understanding that he has concerning that charge.

MR. EVSEROFF: Respectfully except.

MR. WINOGRAD: Exception.

May we have the material?

MR. TARTAGLIA: For the record, Judge, this witness never made any recorded statements of any kind. He was only interviewed by me last week and it was only oral and he was never interviewed by detectives where any notes were taken of any kind. He was only spoken to two or three times by police. Nothing was ever recorded, I have no recorded notes or records or prior statements. He did not testify in the Grand Jury with respect to this matter at all.

THE COURT; All right, gentlemen.

Appendix D
Excerpts From Trial Transcript, New York Supreme Court, Bronx County, Pages 218-224

(218) A. Yes, sir.

Q. And, how did you meet Benny for the first time, what did you tell this jury?

A. I told them I met him at a bar, at Mr. Pips.

Q. Did you ever tell anyone or any detective or any district attorney that you met Benny at a party in Florida?

A. No, sir.

Q. No question about that in your mind?

A. I am not sure, but as far as I can remember, no.

Q. And, it is your testimony that the first time you ever met Benny was in 1973 and when you don't know?

A. Correct, yes.

MR. WINOGRAD: May I have this marked as Defendant's B for identification?

MR. TARTAGLIA: May I see it, your Honor?

(Whereupon, the above mentioned document was marked Defendant Coniglio's Exhibit B for identification.)

COURT OFFICER: Marked Defendant's B for identification.

MR. EVSEROFF: I have seen it, thank you, (219) your Honor.

THE COURT: Show it to the witness.

Q. Miss Sanzo, I show you what has been marked Defendant's B for identification and ask you whether or not you can identify that photograph?

A. I don't recall it but that's myself.

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Q. Who is the other person?

A. Benny.

Q. And when was that taken?

A. I don't recall.

Q. Look at it.

MR. TARTAGLIA: Objection.

I ask the Court to look at the exhibit.

THE COURT: A question is not going to be asked of you. Do not answer the questions. There is going to be an objection made to it. The question is going to be asked, don't answer the question until I have had an opportunity to rule on it, you understand?

THE WITNESS: Yes, sir.

Q. Look at the reverse side of that photograph and, I ask you whether or not that refreshes your mind as to when that photograph was taken?

MR. TARTAGLIA: Objection, now.

(220) THE COURT: The question is just, whether that refreshes.

By looking at it -- Miss, do you know what it means to refresh your recollection?

THE WITNESS: Yes, sir.

THE COURT: Just look at the back of that photograph and simply answer yes or no, whether it refreshes your recollection.

THE WITNESS: No, sir.

Q. Did you know Benny on July 18, 1971?

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A. No, sir, because I was with my husband at the time.

Q. And, you didn't go out with other men?

A. I certainly did not.

Q. While you were with your husband?

A. I certainly did not.

MR. WINOGRAD: Your Honor, I move that photograph be admitted into evidence.

MR. TARTAGLIA: I object -- pardon me, I do not object, except for the back portion which has not been established.

THE COURT: The photograph itself may go into evidence, however, the reverse side of it, containing certain writing on it, may not. (221) Now, if you wish to offer the photograph, I do not know for what purpose, but if you wish to offer the photograph itself, it may be received, but not the reverse side of it.

MR. WINOGRAD: I wish to offer the photograph.

THE COURT: All right.

Let me see it.

Do the People wish to be heard on this?

MR. TARTAGLIA: No, Judge, only as to the matter --

THE COURT: I mean on the admission of the photograph itself in evidence?

You are offering a photograph?

MR. WINOGRAD: May we have a side bar?

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THE COURT: Side bar.

(Whereupon, all parties approach the side bar, and the following transpires, outside the hearing of the jury.)

MR. WINOGRAD: Your Honor, I object to your remarks when you say, what value does it have, in front of the jury. It indicates that it means nothing. It has some meaning, it has a definite meaning. The other witnesses who will testify --

(222) MR. TARTAGLIA: To what?

MR. WINOGRAD: To a relationship prior to 1973.

MR. TARTAGLIA: What is the relevancy of that? That's a collateral issue.

THE COURT: Just a moment.

Mr. Winograd, my statement was only directed at the photograph. This witness has testified that there was a relationship, a rather close one, between these parties. Now, you are simply offering in evidence a photograph of both of them in a bathing suit. Now, what is the value of that? I am certain, as I indicated, I will not permit you to put in evidence the writing that's on the back, on the reverse side of the photograph, which is pure and simply hearsay.

MR. WINOGRAD: How about the person that took the photograph and the date it is taken?

MR. TARTAGLIA: It would be immaterial because it is collateral. If that's a collateral issue, whether she knew him or not, that's not the question of guilt or innocence. He can't introduce independent evidence to impeach her.

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(223) MR. WINOGRAD: Sure --

MR. TARTAGLIA: It is a collateral issue.

THE COURT: On the photograph, what is the purpose in offering the photograph where she has admitted, she stated very clearly that they knew each other, what probative value does it have?

MR. WINOGRAD: It has probative value insofar as I intend to offer the relationship with respect to the witness and this woman prior to the date in question.

MR. TARTAGLIA: The witness and this woman?

MR. WINOGRAD: And this defendant.

MR. TARTAGLIA: What is the nature of this relationship that counsel says is material to this cross examination?

THE COURT: I sustain your objection to the admission of the photograph.

MR. TARTAGLIA: Thank you, your Honor.

THE COURT: When I rule it is not necessary to thank me, I am ruling on the law, this applies to everyone, I am ruling on the law. I am not looking for thanks one way or the other.

(Whereupon, the following transpired in open (224) court.)

THE COURT: The objection will be sustained to the offer of the photograph. It is not in evidence.

MR. TARTAGLIA: I ask it be put in counsel's folder and not displayed.

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THE COURT: Keep it face down, don't exhibit it to the jury, please.

CROSS EXAMINATION (continued)

BY MR. WINOGRAD:

Q. Now, Miss Sanzo, when was the first time that you came up here to New York and spent some time with the assistant district attorney?

A. The first time?

Q. Yeah.

A. Was the end of 1978.

Q. Would that be the last week in December?

A. Approximately, yes.

Q. How long did you spend with the assistant district attorney and police officers?

A. I was up here approximately a week.

Q. A week? How many hours would you say you spent with Mr. Tartaglia and the detectives?

A. Very few.

Appendix E
Statutory Provisions Involved in the Case

28 § 1257. State courts; appeal; certiorari

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

No. 80-324

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1980

BENNY CONIGLIO,

Petitioner,

against

THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

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Questions Presented

1. Whether the trial court's ruling that Jack Skulsky not be questioned as to his specific residence or the specific jurisdiction in which a marijuana prosecution was pending against him raised a substantial question of federal constitutional law.

2. Whether this Court has jurisdiction to consider a question of state evidentiary law, *i.e.*, the exclusion of extrinsic evidence to contradict a prosecution witness on a collateral issue.

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Preliminary Statement

This is a petition for a writ of certiorari to review the order of the Supreme Court of the State of New York, Appellate Division, First Department, entered March 25, 1980, which unanimously affirmed the April 25, 1979 judgment of the Supreme Court, Bronx County, which convicted petitioner and his co-defendant George Clementi, after a trial by jury, of Murder in the Second Degree [New York

Penal Law § 125.25(1)] and sentenced petitioner to an indeterminate term of life imprisonment with a minimum term of twenty-five years. Leave to appeal to the New York Court of Appeals was denied by Associate Judge Bernard S. Meyer of that Court on June 27, 1980.

Petitioner is presently incarcerated pursuant to the judgment of conviction.

Statement of the Case

In the early morning hours of May 28, 1973, Thomas Genco was killed by a single shot from a .38 calibre gun as he stood in front of the Cabaret Lounge in Bronx County. Petitioner and George Clementi were indicted for the slaying by the Bronx County Grand Jury on June 28, 1973, but neither man was apprehended until 1977. On April 25, 1979, following a joint trial by jury, both were convicted of intentional murder.

The prosecution's case against petitioner consisted of strong circumstantial evidence. His presence in the Cabaret Lounge, at the far end of the bar, was established by four witnesses. Two of the witnesses, Gus Santoro and Jack Skulsky, provided the motive for the crime; both saw petitioner and Clementi argue with Genco shortly before the shooting, and Skulsky recalled that Clementi struck Genco. As the fight subsided, petitioner warned Genco that their dispute wasn't over. Genco was shot when, having stood outside the bar for some time after the argument, he leaned into a black car which had pulled up. The sole witness, Nick DiGiorno, merely heard a gunshot and saw

Genco fall on his back, but did not see who was inside the car. Likewise, Michael Vivenzio, who stepped out of the bar moments afterward, could only see that two men were in the late model, black car as it sped away.

However, petitioner was tied directly to the shooting by two witnesses who had seen him with a black, late model automobile outside the bar immediately before the shooting. Theresa Cicale testified that she spoke to petitioner, whom she knew, directly outside the Cabaret Lounge. John Genco, brother of the deceased, spotted petitioner and Clementi standing outside the bar next to a double-parked black car talking to Theresa. He recognized them as the pair he had seen earlier at the far end of the bar, staring at his brother Tommy. John Genco walked halfway down the street to get his own car. As he started it, he saw the same black car that had been double-parked in front of the bar back up until it was directly in front of him. Inside, he saw the same two men whom he had seen talking to Theresa Cicale and standing at the far end of the bar. They suddenly sped off back in the direction of the Cabaret Lounge.

That petitioner had indeed been one of the killers was confirmed by Nanette Sanzo, whom he subsequently met and lived with for two months in Hollywood, Florida. Coniglio told her that "he had shot someone in the head in the front of a bar in New York, over ten thousand dollars," and that at the time of the shooting, he was seated in the car. The prosecutor also introduced evidence that petitioner had ceased reporting to his job on the day of the murder, never to return, that four years elapsed between the murder and his arrest, during which he had been

living under the name of Benjamin DeGrosse, that he maintained a Florida driver's license in that name, and that when arrested, he possessed a car rented to him in that name at an address in Hollywood, Florida.

Prior to the testimony of Jack Skulsky, the prosecutor requested that "no questions be asked by defense counsel as to the present residence of this particular witness." The prosecutor had earlier informed the court that Skulsky had received an "unusual" phone call prior to his testimony and was concerned about his well-being. When the court demanded a showing before it would grant the request, the prosecutor reported that Skulsky feared his life was endangered, based, in part, upon a "strange phone call received by Nanette Sanzo which caused alarm to the prosecution. The court thereupon ruled that, to assure the witness' security, it would not permit questions as to Skulsky's actual residence or the jurisdiction in which a marijuana prosecution against Skulsky was pending. However, the court specified that these would be the only such limitations, and the defense could fully inquire into the facts and circumstances surrounding Skulsky's arrest, the nature of and penalties for the crime charged, and any promises, agreement or understanding he might have had with the prosecutor's office. Counsel for petitioner indicated that he knew where Skulsky lived and the jurisdiction where the marijuana charges were pending. (See Petition for Certiorari, Appendix C, pp. 4a-8a).

Nanette Sanzo testified that she had met petitioner in 1973 and denied, on cross-examination, that she knew him on July 18, 1971. On cross-examination, defense counsel

sought to introduce a photograph of the witness and Benny Coniglio, on the back of which was written a pre-1973 date. Counsel's only stated basis for offering the photograph was to prove the existence of a relationship between Sanzo and petitioner "prior to the date in question." The court ruled the exhibit inadmissible both because the writing on it was hearsay and because the picture by itself lacked any probative value. Although defense counsel asked whether he might call the photographer to testify as to the photograph's date, the court never ruled on that question, and neither the photographer nor any other witness was called to testify as to a prior relationship between petitioner and Sanzo. (See Appendix D to Petition for Certiorari, pp. 9a-14a).

Neither petitioner nor his co-defendant Clementi called any witnesses or presented any evidence on their own behalf.

Reasons Why the Writ Should Be Denied

Petitioner asserts that his Sixth Amendment right to confrontation was abridged by two unrelated rulings of the trial court: 1) its exclusion of Jack Skulsky's residence and the jurisdiction in which a marijuana prosecution was pending against Skulsky, and 2) its refusal to admit extrinsic evidence contradicting Nanette Sanzo's testimony that she had not known petitioner prior to 1973. Neither of petitioner's claims merits the consideration of this Court, for in each instance it was defense counsel's unwillingness to pursue open avenues of inquiry, rather than any ruling by the court, which precluded him from impeaching the witness' credibility.

The Cross-Examination of Skulsky

Petitioner assails the trial court's rulings that he could not elicit Skulsky's residence or the particular jurisdiction in which a marijuana prosecution was pending against him. Although petitioner complains primarily that the court precluded him from inquiring into the possible penalties faced by Skulsky the court in fact specifically permitted inquiry into that area (Petition, Appendix C, pp. 6a-7a). Significantly, however, counsel for petitioner did not even ask Skulsky about those penalties. By his own admission (Petition, Appendix C, pp. 4a-5a) counsel knew the jurisdiction in which the prosecution was pending and could readily have ascertained the maximum penalties and confronted Skulsky with them. Having chosen not to do so, he can hardly pass the blame to the court. Similarly, he asserts that by not having to reveal his residence, Skulsky could testify falsely as to "his mode of life, his other criminal activities, his associations and behavior without real fear of refutation as to any significant misstatements" (Petition, pp. 9-10). Once again, however, petitioner's trial counsel asserted that he knew where Skulsky resided (Petition, Appendix C, pp. 4a-5a), and so presumably thoroughly investigated his background. He could easily have confronted Skulsky with any damaging findings had he elected to do so. Moreover, whether petitioner could have refuted, by extrinsic evidence, "any significant misstatements" of his background (he points to none) is a separate question of state evidentiary law wholly divorced from the question of revealing his residence to the jury.

Petitioner was also permitted to thoroughly examine Skulsky concerning the issue which bore most directly upon

his credibility, the nature of any promises made to him *vis-a-vis* his pending charge, and with regard to the facts and circumstances underlying that charge (Petition, Appendix C, p. 8a). The fact that he had resigned from the police department after admitting to smoking marijuana was revealed to the jury and supplied grist for cross-examination. Thus, while the court's ruling that Skulsky could not be asked about the state of the prosecution or where he lived raised, on its face, a federal question, the fact that counsel was thereby not hampered in his cross-examination, but instead elected not to pursue certain avenues, renders it a question without substance in this case.

Moreover, the question of whether a defendant's right to confrontation is unduly restricted by the exclusion of a material witness' address is hardly a novel one demanding determination by this Court. In *Alford* v. *United States*, 282 U.S. 687, 692 (1931), the Court held that a defendant must be given "the opportunity to place the witness in his proper setting," and thereby test the weight of his testimony and his credibility. This standard was applied again in *Smith* v. *Illinois*, 390 U.S. 129 (1968). Neither case established a rule that the exclusion of the witness' address is *per se* prejudicial, and the circuit courts have universally recognized that there is an exception where, as here, the witness' safety may be jeopardized, so long as the defendant had the opportunity to meaningfully cross-examine the witness. *See e.g., United States* v. *Alston*, 460 F.2d 48 (5th Cir. 1972), *cert. denied*, 409 U.S. 871 (1972); *United States* v. *Marti*, 421 F.2d 1263 (2d Cir. 1970); *United States* v. *Teller*, 412 F.2d 374, 379 (7th Cir. 1969), *cert. denied*, 402 U.S. 949 (1971). In the instant case, petitioner does not call for an expansion or alteration of any of these holdings,

but merely for this Court to apply the *Alford* rule to his own case. Clearly, there is no reason for this Court to divert its limited time and energies from more pressing questions to perform what is essentially the task of intermediate appellate courts, least of all to consider a question as insubstantial as that presented here.

The Refusal to Admit Extrinsic Evidence

Petitioner alleges that the trial court's denial of his attempt to introduce extrinsic evidence contradicting Nanette Sanzo's testimony that she did not know petitioner before 1973 precluded him from establishing bias on her part. Counsel, however, never formally attempted to introduce the purported "evidence," nor obtained a ruling from the court on its admissibility. In fact, the only extrinsic evidence which he did offer was, by his own admission, properly excluded as hearsay—a photograph of Sanzo and petitioner which had an earlier date written on the back of it (Petition, p. 11). While petitioner now asserts that "the defense inquired if it might call the photographer" (Petition, p. 12), it never secured a ruling from the court and, indeed, never did attempt to call the photographer or any other witness who might contradict Sanzo as to the date. Nor, in fact, did petitioner even assert that he actually had any such witnesses available to testify.

Even had he proffered such evidence, its admission would have been purely a matter of state law, and not subject to the jurisdiction of this Court. 28 U.S.C. § 1257. While petitioner attempts to bootstrap the issue into this Court by portraying it as a denial of the right to confrontation, in that he was allegedly precluded from proving

Sanzo's bias or hostility, he never presented it as a constitutional claim at trial. In fact, he never even suggested there that he was attempting to prove bias or hostility. The record reveals that he offered the photograph merely to contradict Sanzo's testimony as to when she had met petitioner (Petition, Appendix D, p. 13a). This was hardly surprising since, as petitioner is forced to concede, the matter sought to be proved by extrinsic evidence "was not in itself obviously indicative of hostility or bias on the part of the witness" (Petition, p. 13). Clearly, therefore, even if he had attempted to call the photographer himself to contradict her testimony, he would merely have presented the court with an evidentiary issue—whether extrinsic evidence may be admitted to prove a collateral fact denied by a witness—an issue which we submit is a matter of state law, falling far short of constitutional dimension and the jurisdiction of this Court.

Conclusion

The petition for writ of certiorari should be denied.

Respectfully submitted,

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October 1980